Supreme Court, U.S.
FILED
JUN 9 ~ 2003
OFFICE OF THE CLERK

No. 02-1486

IN THE

Supreme Court of the United States

EDWARD ALAMEIDA, *et al.*,

Petitioners,

v.

EARL WYATT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should disturb the rule that failure to exhaust administrative remedies is an affirmative defense under the Prison Litigation Reform Act to be plead and proven by the defense.

2. Whether the Court should disturb the rule that *pro se* prisoner litigants must be provided with "fair notice" of Fed. R. Civ. P. 56 summary judgment procedures prior to entering summary judgment against them.

PARTIES TO THE PROCEEDING

Respondent Wyatt agrees with the description of Petitioners[1] and Respondent set forth in the Petition for Writ of Certiorari, except that Wyatt's California Department of Corrections No. is C-80121. Wyatt resides in Mule Creek State Prison, California.

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1. Petitioners may be alternatively referred to herein as the "State of California" or the "State."

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Respondent Earl Wyatt ("Wyatt") respectfully requests that this Court deny the Petition for Writ of Certiorari, which seeks review of the Ninth Circuit's opinion captioned and published as *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003) ("*Wyatt III*").[2]

OPINIONS AND ORDERS ENTERED BELOW

Wyatt concurs with the list of published and unpublished opinions, orders and citations in this case, as set forth at page 1 of Petitioners' brief.

STATEMENT OF JURISDICTION

On December 31, 2002, the Ninth Circuit denied the State's second and final Petition for Rehearing. (App. 72-73.)[3] On January 2, 2003, the Ninth Circuit issued *Wyatt III*. (App. 1.) On April 1, 2003, Petitioner filed its Petition for Writ of Certiorari, seeking this Court's review of *Wyatt III*.

Because the State's Petition for Writ of Certiorari was filed more than 90 days following December 31, 2002 when the Ninth Circuit denied the State's Petition for Rehearing, the Petition for Writ of Certiorari is untimely pursuant to Supreme Court Rule 13, depriving this Court of jurisdiction. 28 U.S.C. § 2101; *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (90 day time-limit is "mandatory and jurisdictional" and cannot be extended "except as Congress permits"); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952) (amendment of appellate court opinion does not start the clock anew where no substantive change has occurred).

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2. The *Wyatt v. Terhune* chronology is more fully set forth in the Statement of the Case, *infra*.

3. The Appendices to the Petition for Writ of Certiorari are abbreviated in the citations herein as "App."

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1997e(a) [Prison Litigation Reform Act].

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

2. 28 U.S.C. § 2111.

> Harmless Error: On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

On March 15, 1999, Respondent Wyatt filed a Section 1983 *pro se* complaint against Cal Terhune and Susan Hubbard, the wardens of the Mule Creek State Prison in Ione, California. Wyatt, a practicing Rastafarian, contended that a statewide prison guideline that required him to cut his hair to within three inches of his scalp violated his First, Fifth and Fourteenth Amendment rights, 42 U.S.C. § 2000bb-1 (Religious Freedom Restoration Act ("RFRA"))[4], California Code of Regulations, Title 15, § 3062(e) and (f) and the California Penal Code §§ 5054, 5058.

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4. In 2000, Congress replaced RFRA, which had been invalidated by this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), with the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"). The Ninth (Cont'd)

On August 11, 1999, contending that Wyatt had failed to exhaust his administrative remedies, the State filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). On October 18, 1999, Magistrate Judge John F. Moulds issued Findings and Recommendations ("Findings No. 1") in which he: (a) dismissed all of Wyatt's claims for failure to exhaust, except for his First Amendment claim, which the court found exempt from the exhaustion requirement on grounds of futility and (b) denied Wyatt's request for a preliminary injunction. Wyatt timely objected to Findings No. 1 on November 5, 1999. On December 1, 1999, the district court conducted a *de novo* review, adopted the magistrate judge's Findings No. 1 and ordered the State to answer Wyatt's remaining claim.

On February 4, 2000, the magistrate judge directed the State to file a motion for summary judgment in light of the magistrate judge's findings and recommendations in an unrelated case, *Toyebo v. Terhune*, Case No. S-98-0292 GEB JFM (E.D. Cal. Aug. 28, 1990), which addressed the same grooming guidelines, except as applied to Native American inmates. The State filed a motion for summary judgment on February 18, 2000, and on May 11, 2000, the magistrate judge issued Findings and Recommendations ("Findings No. 2") granting the State's motion. Wyatt filed an objection to the magistrate's Findings No. 2 on June 6, 2000. On June 18, 2000, the district court conducted a *de novo* review of the magistrate judge's Findings No. 2 and adopted them in full. Judgment was entered against Wyatt that same day.

(Cont'd)

Circuit ordered the district court to permit Wyatt to amend his complaint to replace his RFRA claim with one based on RLUIPA. *Wyatt III*, 315 F.3d at 1115-1116. That portion of *Wyatt III* is not the subject of the State's Petition.

On July 27, 2000, Wyatt filed a timely notice of appeal to the Ninth Circuit challenging both the district court's orders (a) granting the motion to dismiss his claims and (b) granting the State's motion for summary judgment. On February 12, 2002, the Ninth Circuit (Fisher, J.) reversed, determining that Wyatt's equal protection claim should not have been dismissed for failure to exhaust administrative remedies because exhaustion is an affirmative defense, which the State did not carry the burden of proving either by review of the pleadings or by consideration of extrinsic evidence. The Ninth Circuit also determined that summary judgment on Wyatt's First Amendment free exercise claim should not have been entered because Wyatt did not receive "fair notice" of summary judgment procedures and requirements, and because even if he did, the district court improperly took judicial notice of crucial facts without which the summary judgment decision could not stand. *Wyatt v. Terhune*, 280 F.3d 1238 (9th Cir. 2002) ("*Wyatt I*").

On September 23, 2002, the Ninth Circuit denied the State's first petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit also revised its original opinion without substantive change, issuing *Wyatt v. Terhune*, 305 F.3d 1033 (9th Cir. 2002) ("*Wyatt II*"). On December 31, 2002, the Ninth Circuit denied the State's second petition for rehearing *en banc* and entered judgment in favor of Wyatt. The Ninth Circuit also revised its first amended opinion without substantive change, issuing *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. January 2, 2003) ("*Wyatt III*"). It was not until April 1, 2003 that the State filed its Petition for Writ of Certiorari, seeking review of *Wyatt III*.

REASONS FOR DENYING THE PETITION

Petitioners mischaracterize the state of the law among the circuits on the issue of administrative exhaustion under the Prison Litigation Reform Act ("PLRA"), asserting that it is "badly fractured." In fact, a clear majority rule exists and was followed by the Ninth Circuit below, holding that exhaustion of administrative remedies is an affirmative defense for purposes of the PLRA. *See Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (following the "vast majority of circuit courts [that] have characterized PLRA exhaustion as an affirmative defense"). Petitioners instead ask this Court to adopt a heightened pleading standard based on anomalous authority from the Sixth Circuit. *See Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002) (discussing the Sixth Circuit's "heightened pleading standard"). The Ninth Circuit's sensible decision to follow the clear majority rule does not merit this Court's review.

Petitioners also inaccurately portray the Ninth Circuit as out of step with other circuits for adhering to the longstanding principle of providing *pro se* prisoner litigants with "fair notice" of federal summary judgment procedures under Federal Rule of Civil Procedure 56. The Ninth Circuit's application of this principle is in accordance with numerous other circuits that have addressed the issue and is, in fact, more conservative than the approach followed by several of them. For this additional reason, *Wyatt III* is wholly unremarkable and does not merit this Court's review.

I.

THE PETITION SHOULD BE DENIED BECAUSE *WYATT III* IS IN ACCORD WITH THE OVERWHELMING MAJORITY RULE, WHICH PROVIDES THAT THE EXHAUSTION REQUIREMENT UNDER THE PLRA IS AN AFFIRMATIVE DEFENSE

A. The Vast Majority Of Circuit Courts Agree That Exhaustion Under The PLRA Is An Affirmative Defense

Petitioners misrepresent the state of PLRA exhaustion law among the circuits by characterizing it as "badly fractured." (Pet. at 7.)[5] In fact, nearly every circuit court to address the issue has concluded that exhaustion under the PLRA constitutes an affirmative defense. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) ("We hold that § 1997e(a) creates a defense – defendants have the burden of raising and proving the absence of exhaustion."); *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (adopting the "majority rule" that PLRA exhaustion is an affirmative defense); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) ("We thus join the many other circuits that have held that failure to exhaust is an affirmative defense to be pleaded by the defendant."); *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001) (discussing whether defendants waived the *affirmative defense* of exhaustion under the PLRA); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) ("[T]he assertion that a plaintiff prisoner failed to exhaust all available administrative remedies as required under the PLRA is an affirmative defense under Fed. R. Civ. P. 8(c)."); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999)

5. The Petition for Writ of Certiorari is abbreviated in the citations herein as "Pet."

("A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure."); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999) ("[A] defendant in a prisoner 1983 suit may also assert as an affirmative defense the plaintiff's failure to comply with the PLRA's requirements."); *see also Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998) (explaining that the PLRA "imposes a[n] [exhaustion] requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling").

The only circuit court to reach a contrary conclusion is the Sixth Circuit, which held in *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998) that the PLRA imposes a heightened pleading standard with respect to exhaustion of administrative remedies. According to *Brown*, prisoners bringing § 1983 claims "must allege and show that they have exhausted all available state administrative remedies." *Id.* at 1104. The Sixth Circuit further described these pleading requirements as follows:

> We held [in *Brown*] that in order to effectuate [the PLRA's exhaustion requirement], a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Knuckles-El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000). The Sixth Circuit has explicitly referred to this as a "heightened pleading standard." *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002).

The Ninth Circuit's uncontroversial decision to follow the overwhelming majority rule does not merit this Court's review. Every circuit to take a position on the issue, except the Sixth, has held either explicitly or implicitly that PLRA exhaustion is an affirmative defense that must be pled and proven by the defendant. Furthermore, the Sixth Circuit's position is an anomaly that appears to conflict with this Court's recent unanimous decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002),[6] in which this Court reiterated that courts may not require greater particularity in pleading than the Federal Rules of Civil Procedure require.[7] It also runs afoul of the general principle that technical pleading requirements should be applied liberally to *pro se* prisoners. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

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6. Petitioners state that the circuits in the majority are "silent on the application of *Swierkiewicz*." (Pet. at 7.) Since none of those courts imposed a heightened pleading standard, however, they had no reason to discuss *Swierkiewicz*.

7. In *Baxter*, the Sixth Circuit attempted to distinguish *Swierkiewicz* on the ground that *Baxter* "does not take its authority from the Federal Rules of Civil Procedure, but from the Prison Litigation Reform Act." 305 F.3d at 490. Given that the PLRA does not specify the manner for *pleading* exhaustion, however, the Sixth Circuit's opinion is difficult to reconcile with this Court's holding that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

B. Intra-Circuit Authority Is Uniform In Adhering to the Principle That PLRA Exhaustion Is an Affirmative Defense

As part of their attempt to obscure the existence of an overwhelming majority rule, Petitioners suggest that the opinions within the seven circuit courts that comprise the majority have either been less than uniform in interpreting PLRA exhaustion as an affirmative defense or based on dicta. (Pet. at 7-8.) An even cursory analysis of the relevant case law reveals that neither is true. These circuits have consistently and unambiguously determined that exhaustion is an affirmative defense under the PLRA.

Petitioners begin by questioning the significance of the Second Circuit's view because they contend it is derived from dicta in *Jenkins*. (Pet. at 7.) District courts within the Second Circuit, however, have uniformly interpreted *Jenkins* as setting forth the rule of this circuit that exhaustion under the PLRA is an affirmative defense. *See Torrence v. Pesanti*, 239 F. Supp. 2d 230, 232-33 (D. Conn. 2003) ("This court agrees that, in the Second Circuit, the failure to exhaust administrative remedies under the PLRA is an affirmative defense analogous to a statute of limitations defense."); *Abney v. County of Nassau*, 237 F. Supp. 2d 278, 280 (E.D.N.Y. 2002) ("The Second Circuit has construed the PLRA exhaustion requirement as an affirmative defense."); *Reyes v. Punzal*, 206 F. Supp. 2d 431, 433 (W.D.N.Y. 2002) ("I also recognize that in the Second Circuit, failure to comply with the PLRA's exhaustion requirement is viewed as an affirmative defense, *see Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999), and that accordingly, defendant bears the burden of proving plaintiff's failure to comply with the exhaustion requirement."); *John v. N.Y.C. Department of Corrections*, 183 F. Supp. 2d 619, 624 (S.D.N.Y. 2002)

("Failure to comply with the exhaustion requirement is an affirmative defense."); *Hallett v. New York State Department of Correctional Services*, 109 F. Supp. 2d 190, 196 (S.D.N.Y. 2000) ("[I]n the Second Circuit, failure to comply with the PLRA's exhaustion requirement is viewed as an affirmative defense."). Furthermore, the Second Circuit held in a case decided after *Jenkins* that before a court may *sua sponte* dismiss a prisoner complaint for failure to exhaust administrative remedies under the PLRA, it must give the prisoner notice and an opportunity to be heard. *See Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999). Such a holding is irreconcilable with a rule requiring a prisoner to establish exhaustion in his or her pleading.[8] Accordingly, the Second Circuit is unquestionably in accord with the majority rule.[9]

Petitioners also accuse the Seventh Circuit of being "internally divided," (Pet. at 7), based on one passage taken out of context from *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000), in which the court stated that "dismissal on the pleadings is proper for failure to plead the exhaustion of administrative remedies." In *Massey v. Wheeler*, however, the plaintiff *conceded* in his complaint that he had not exhausted his administrative remedies. *Id.* at 1034. Accordingly, the court dismissed his complaint under

8. In another case decided subsequent to *Jenkins*, the Second Circuit again referred to exhaustion under the PLRA as an affirmative defense. *See Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000).

9. Thus, Petitioners disparagement of *Massey* and *Foulk* for "deriv[ing] their view from dicta in *Jenkins*" has no merit. Moreover, as a factual matter, Petitioners' assertion that *Massey* and *Foulk* "derive their view" from *Jenkins* is not accurate. In *Massey*, the court cites not only to *Jenkins* but also to a prior Seventh Circuit case, *King v. Cooke*, 26 F.3d 720, 724 (7th Cir. 1994), in support of the principle that exhaustion is an affirmative defense. *See Massey*, 196 F.3d at 735. As for *Foulk*, the court does not cite or even refer to *Jenkins*. Rather, Petitioners' argument is apparently discerned from the fact that *Foulk* relies on *Massey* which, in turn, cited to *Jenkins*.

Rule 12(b)(6) without considering evidence concerning exhaustion. *Id.* at 1034. *Massey v. Wheeler* in no way contradicts the Seventh Circuit authority of *Massey v. Helman*.

Petitioners additionally point out that two Seventh Circuit cases – *Smith v. Zachary*, 255 F.3d 446 (7th Cir. 2001) and *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999) – describe exhaustion as a "precondition" to suit, presumably offering further support for their contention that the Seventh Circuit is "internally divided." (Pet. at 7.) A brief analysis of these cases, however, makes clear that this is a red herring.

Smith did not address or even make reference to the question of whether exhaustion is an affirmative defense. Rather, the case analyzed whether the use of excessive force is a "prison condition" within the meaning of the PLRA. *See Smith*, 255 F.3d at 448-53.

Petitioner's reliance on *Perez* is even more disingenuous, as *Perez* clearly treats exhaustion as an affirmative defense. The court states,

> The [PLRA] gives prisons and their officials a valuable entitlement – the right not to face a decision on the merits – which courts must respect *if a defendant chooses to invoke it. . . . Defendants may waive or forfeit reliance on § 1997e(a), just as they may waive or forfeit the benefit of a statute of limitations.*

Perez, 182 F.3d at 536 (emphasis added).[10]

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10. As a general matter, the use of the word "precondition" is of no consequence. Satisfying a statute of limitations is also a "precondition" to suit, yet a statute of limitations is an affirmative defense. *See Wyatt*, 315 F.3d at 1117 (likening exhaustion under the PLRA to a statute of limitations); *Perez*, 182 F.3d at 536 (same).

The State's critique of the Third Circuit is also misleading. Petitioners contend that *Ray* is "inconsistent with the facts underlying [the Third Circuit's] prior decision" in *Booth*, in which the court *sua sponte* dismissed a prisoner's complaint for failure to exhaust administrative remedies. (Pet. at 8); *see Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000). Like *Massey v. Wheeler*, however, *Booth* involved a prisoner who *conceded* in his complaint that he had not exhausted his administrative remedies. *Id.* at 292 n.3. The court in *Ray* explicitly made this very point in refuting an argument similar to the one Petitioners assert here. *Ray*, 285 F.3d at 293 n.5 (distinguishing *Booth* on the grounds that the prisoner had conceded his failure to exhaust administrative remedies).

Petitioners take the position that the Fifth Circuit follows an approach similar to that of the anomalous Sixth Circuit. (Pet. at 8.) This is simply not the case. The lone Fifth Circuit case cited by Petitioners – *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998) – does not adopt a heightened pleading standard or otherwise follow the Sixth Circuit. Rather, in *Underwood*, the court merely concluded that a prisoner could avoid dismissal, despite the lack of evidence of exhaustion in the record, by alleging exhaustion "with sufficient specificity." *Id.* at 296.

Furthermore, subsequent Fifth Circuit cases – none of which are cited in Petitioners' brief – clarify that the Fifth Circuit's view of exhaustion under the PLRA is consistent with the majority rule. Indeed, in *Wendell v. Asher*, 162 F.3d 887 (5th Cir. 1998), the court explained that exhaustion under the PLRA "imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling." *Id.* at 890; *see also Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (citing *Wendell* and reciting the above quote).

Petitioners also argue that the D.C. Circuit in *Jackson* "did not decide this issue." (Pet. at 7 n.3.) It is clear, however, that the D.C. Circuit at least *implicitly understood* exhaustion under the PLRA to be an affirmative defense. In *Jackson*, the prisoners argued that the defendants had "waived the [exhaustion] *defense*" by failing to assert it in their original answers. 254 F.3d at 267 (emphasis added). The court considered, but ultimately denied, the argument. *Id.* Clearly, if the court did not view exhaustion as an affirmative defense, it would have had no reason to even consider the waiver argument.[11]

Petitioners further assert that *Wyatt III* is inconsistent with a prior Ninth Circuit opinion, *Bennett v. King*, 293 F.3d 1096 (9th Cir. 2002).[12] (Pet. at 8.) In *Bennett*, the district court dismissed a prisoner's complaint for failure to exhaust administrative remedies but gave him 30 days leave to amend to cure the defect. Because the prisoner failed to amend within 30 days, the district court dismissed the action. *Id.* The prisoner appealed, and the Ninth Circuit, after considering the evidence of exhaustion, concluded that the prisoner "did not exhaust his administrative remedies." *Id.* Nothing in *Bennett*

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11. Thus, in *Abdus-Shahid M.S. Ali v. District of Columbia*, 278 F.3d 1, 5-6 (D.C. Cir. 2002), the court, in holding that the PLRA's exhaustion mandate is not jurisdictional, observed, "Although we have never directly ruled that the requirement is not jurisdictional, in *Jackson* we rejected inmates' argument that the defendants had waived their exhaustion defense, 254 F.3d at 267 (D.C. Cir. 2001), *an issue we never would have considered if exhaustion were jurisdictional*." (Emphasis added).

12. Petitioners improperly cite to an earlier, withdrawn opinion from *Bennett*. (Pet. at 8); *see Bennett v. King*, 205 F.3d 1188 (9th Cir. 2000), *withdrawn by Bennett v. King*, 293 F.3d 1096 (9th Cir. 2002). We assume for the sake of this Opposition that Petitioners intended to cite to the more recent opinion.

suggests that the court either explicitly or implicitly endorsed a heightened pleading standard like the one in the Sixth Circuit.[13]

Finally, and tellingly, Petitioners fail to acknowledge the First Circuit's recent adoption of the majority rule, in *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002). In reaching its decision in that case, the court observed that "the vast majority of courts have characterized PLRA exhaustion as an affirmative defense." *Id.* That apt observation continues to be true today, regardless of the State's wishes otherwise.

C. Federal Rule of Civil Procedure 9(c) Does Not Impose a Heightened Pleading Standard for the Performance of a Condition Precedent

Petitioners mistakenly assume that if exhaustion is a condition precedent, it necessarily must be plead with some heightened level of specificity. This assumption, however, directly conflicts with Federal Rule of Civil Procedure 9(c), which eliminates heightened pleading standards for conditions precedent.

Federal Rule of Civil Procedure Rule 9(c) provides,

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Fed. R. Civ. P. 9(c). The purpose of Rule 9(c) was "to eliminate the detailed and largely unnecessary averments that resulted under

13. The Eighth Circuit is the only circuit that has changed its position on this issue, initially adopting a heightened pleading standard based on the Sixth Circuit rule, *see McAlphin v. Morgan*, 216 F.3d 680, 682 (8th Cir. 2000), and subsequently adopting the majority rule that exhaustion is an affirmative defense, *see Foulk*, 262 F.3d at 697.

common law procedure, and to prevent nonmeritorious dismissals for failure to plead fulfillment of conditions precedent that are not at issue in the suit." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1302 (2d ed. 1990). Rule 9(c) does not expressly require that performance of conditions be pled; it merely sets forth the *manner in which such allegations should be made. See Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir. 1998) (holding that the allegation that an accident occurred while an insurance policy was in full force and effect is considered an "averment" that all conditions precedent have been satisfied). Accordingly, even assuming, *arguendo*, that the Court were to conclude that exhaustion under the PLRA *is* a condition precedent to suit under the PLRA, it does not follow that this would impose a heightened pleading standard similar to the one adopted by the Sixth Circuit. In fact, Rule 9(c) explicitly forecloses such a result.[14]

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14. It is worth noting that in *Wyatt I*, the Ninth Circuit determined that Respondent's allegations of exhaustion were sufficient to survive a Rule 12(b)(6) motion. *See Wyatt I*, 280 F.3d at 1246. Accordingly, even if the Court were to adopt the Sixth Circuit's heightened pleading standard, it would likely not alter the outcome of the Ninth Circuit's ruling on the State's motion to dismiss.

II.

THE PETITION SHOULD BE DENIED BECAUSE *WYATT III* DOES NOTHING MORE THAN WHAT NUMEROUS CIRCUITS, INCLUDING THE NINTH, HAVE CONSISTENTLY AND JUSTLY DONE: REQUIRE THAT *PRO SE* PRISONER LITIGANTS RECEIVE "FAIR NOTICE" OF FED. R. CIV. P. 56'S SUMMARY JUDGMENT PROCEDURES BEFORE SUMMARY JUDGMENT MAY BE ENTERED AGAINST THEM

A. The Courts Of Appeals Uniformly Agree That *Pro Se* Prisoner Litigants Are Entitled To "Fair Notice" Of Summary Judgment Procedures

In its zeal to portray the Ninth Circuit as a renegade, the State attempts to characterize *Wyatt III* as establishing new frontiers regarding the provision of summary judgment notice to *pro se* prisoner litigants. (*See* Pet. at 10, 13.) In fact, however, numerous circuits, including the Ninth, have long held that courts should ensure *pro se* prisoner litigants receive "fair notice" of Fed. R. Civ. P. 56 procedures before entering summary judgment against them.[15] *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d

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15. "Fair notice" consists of "ordinary, understandable language calculated to apprise an unsophisticated prisoner of his or her rights and obligations under Rule 56" and should include –

> 1) notice of the right to file counter-affidavits or other responsive evidentiary materials;
>
> 2) notice that the failure to do so may result in the moving party's evidence being taken as the truth and in the entry of judgment against the *pro se* prisoner; and

(Cont'd)

639, 642 (2d Cir. 1988) ("If the district court does not so inform the *pro se* party" of the "nature, procedures and consequences of a motion for summary judgment . . . the court may not grant judgment for the moving party"); *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988) ("[d]istrict courts are obligated to advise prisoner pro per litigants of Rule 56 requirements"); *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) ("our jurisprudence requires at least" that a *pro se* prisoner "be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default"); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982) ("we think it appropriate to lay down a general rule that a prisoner who is a plaintiff in a civil case and is not represented by counsel

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(Cont'd)

> 3) notice that if summary judgment is granted, the "prisoner's case will be over" and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 960-961 (9th Cir. 1998) (*en banc*) (setting forth a "model" notice at Appendix A); *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (timely notice of the summary judgment rules should include notice of the "right to file affidavits or other material in opposition to the motion, and of the consequences of default"). Such notice is provided to *pro se* prisoner litigants because of the "complexity of the summary judgment rule," the finality of an order entering summary judgment, the "lack of legal sophistication of the *pro se* prisoner," and the prisoner's limited access to counsel and legal materials. *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); *Rand*, 154 F.3d at 957-958. Such notice is also consistent with the judicial policy of "liberal construction in favor of *pro se* litigants" generally as well as the "Supreme Court's teaching that affirmative measures are sometimes required to ensure that a prisoner's access to the courts is 'adequate, effective, and meaningful.'" *Rand*, 154 F.3d at 957-958 (quoting *Bounds v. Smith*, 430 U.S. 817, 822-823 (1977)).

is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment"); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (state inmate must be "advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him"); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968) (district courts should provide *pro se* prisoners with "fair notice of the requirements of the summary judgment rule").

Not surprisingly, these courts have also consistently held that such notice should be provided when summary judgment is implicated, regardless of how the movant chooses to style its motion. Therefore, the same summary judgment notice procedures are followed whether the dispositive motion originates as a Rule 56 summary judgment motion, or as a Rule 12 motion to dismiss that is converted to a summary judgment motion because of a court's consideration of evidence extrinsic to the pleadings. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992); *Lewis*, 689 F.2d at 101; *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978).[16]

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16. The State's attempt to generate controversy where none exists is exemplified by its incorrect assertion that *Wyatt III* attempts to expand the Ninth Circuit's fair notice practice to "Rule 12 motions to dismiss." (Pet. at 10, 13.) *Wyatt III* does nothing of the sort. Instead, *Wyatt III* states that where a "district court *looks beyond the pleadings* to a factual record in deciding the motion to dismiss for failure to exhaust – *a procedure closely analogous to summary judgment* – then the court must assure that Wyatt has fair notice of his opportunity to develop a record." (App. 20 at n.14) (emphasis added). This is neither novel nor controversial. *See Lewis*, 689 F.2d at 102 ("It goes without saying that the [fair notice] rule applies with equal force when affidavits are submitted in support of a motion to dismiss" – *i.e.* where the court *looks beyond the pleadings*); (Cont'd)

Indeed, with respect to such notice, the Ninth Circuit has been more conservative than others, which require "fair notice" to all *pro se* litigants – not merely those who are incarcerated. *See, e.g., Ruotolo v. Internal Revenue Service*, 28 F.3d 6 (2d Cir. 1994); *Timms v. Frank*, 953 F.2d 281 (7th Cir. 1992); *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287 (11th Cir. 1988).

The State attempts to manufacture a circuit "conflict" – in the otherwise consistent application of summary judgment notice to *pro se* litigants – by pointing to the Sixth Circuit's decision in *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992), and the Fifth Circuit's decision in *Martin v. Harrison County Jail*, 975 F.2d 192 (5th Cir. 1992). (Pet. at 10-11). Such conflict simply does not exist.

On May 27, 2003, the Sixth Circuit issued *United States v. Ninety-Three (93) Firearms*, __ F.3d __, 2003 WL 21210444 (6th Cir. May 27, 2003). There, referring to *Williams* and *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988) – a case ignored by the State – the Sixth Circuit correctly described the state of intra-circuit law at that time:

> While the *Williams* court stated that this circuit has 'no authority . . . for the proposition that a district court must advise a *pro se* prisoner of his right to file counter-affidavits or other responsive material or that he must be alerted to the fact that

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(Cont'd)

Fed. R. Civ. P. 12(b) ("if . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material").

> his failure to so respond with such material might result in entry of summary judgment against him,' it failed to cite *Brock*, which appears to reach the opposite conclusion.

Ninety-Three Firearms, 2003 WL 21210444 at *12. The Court continued by applying the *Brock*, not the *Williams*, summary judgment notice rule to the *pro se* prisoner litigant involved there. *Id.* at *13. Accordingly, the weight of Sixth Circuit authority is consistent, not in conflict, with *Wyatt III*.

A similar result occurs when reviewing the Fifth Circuit's *Martin* decision. *Martin* clearly states: "We adopt the rule of the Sixth and Ninth Circuits" in *Brock* and *Jacobsen v. Filler*, 790 F.2d 1362, 1364-67 (9th Cir. 1986), respectively. *Martin*, 975 F.2d at 193. As described by the Sixth Circuit itself in *Ninety-Three Firearms, supra*, *Brock* holds that *pro se* prisoners should be afforded fair notice of Rule 56 summary judgment procedures. *Jacobsen* does the same, with both concluding that such notice need not be afforded to *pro se* non-prisoner litigants. *See Brock*, 840 F.2d at 343; *Jacobsen*, 790 F.2d at 1364-65 n.4. Therefore, again contrary to the State's representations, the law in the Fifth Circuit is consistent, not in conflict, with *Wyatt III*.

Interestingly, the State notes that the "First, Third, Eighth and Tenth Circuits have filed no opinions" concerning fair notice, apparently contending that this further supports their notion of a circuit conflict. (Pet. at 10.) The State's view is inaccurate. In *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978), the Eighth Circuit held, albeit without expressly referring to "fair notice," that summary judgment could not be entered where the court did not first notify plaintiffs that

it was converting a Rule 12 motion into a Rule 56 motion and did not afford plaintiffs the opportunity to submit responsive evidence. The court was "particularly concerned" about the requisite notice because plaintiffs were *pro se* prisoners. In *Jaxon v. Circle K Corporation*, 773 F.2d 1138, 1140 (10th Cir. 1985), the Tenth Circuit reversed in part summary judgment because of insufficient notice of summary judgment procedures to plaintiff: "District courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." *Id.* (quoting *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984)). Accordingly, the State incorrectly identifies those circuits which have remained silent regarding summary judgment notice, fails to mention that some of the allegedly silent circuits have, in fact, vocalized *consistency* with the *Wyatt III* approach, and illogically infers conflict from silence – all in an effort to persuade this Court of that which does not exist.

Contriving a purported circuit conflict is not Petitioners only error. The State suggests that the summary judgment notice procedures adopted by the Ninth Circuit – and presumably by each of the other nine Courts of Appeals identified above that have ruled consistently – amount to an improper, judicial amendment of the Federal Rules of Civil Procedure. (Pet. at 9-10.[17]) The Courts of Appeals have done nothing of the sort. These courts have simply sought to ensure that those with the most limited access to information and the law be informed of relevant portions of the Federal Rules before their cases may be disposed of on summary judgment. None of the information to be provided is anything other than what Fed. R. Civ. P. 56 already

17. The Rules Enabling Act and Federal Courts Study Act cited by the State were enacted in 1948 and 1988, respectively, not in 1998, rendering the State's "lack [of] rules promulgating-guidance" argument inapplicable. (*See* Pet. at 11 n.4.)

contains. As such, "[a]doption of the fair notice requirement is . . . a proper exercise of [] supervisory power" of the Courts of Appeals over the district courts within their respective circuits. *Rand*, 154 F.3d at 958-959.

B. The Summary Judgment Sought By The State Was And Would Be Denied, Regardless Of Whether Wyatt Received "Fair Notice"

Even if "fair notice" was withheld from Wyatt, as the State apparently argues should have occurred, the Ninth Circuit made clear that the result would be no different – the State's motion for summary judgment on Wyatt's First Amendment free exercise claim would still have been denied. *Wyatt III*, 315 F.3d at 1113-1114. Accordingly, reversal of the appellate court's notice requirements would leave the parties in the same place, rendering reversal futile. *Timms*, 953 F.2d at 286.

As set forth in *Wyatt III*, the State's summary judgment on Wyatt's free exercise claim depends on extensive facts taken from *Toyebo v. Terhune*, No. S-98-0292 (E.D.Cal. Aug. 28, 1990). *Wyatt III*, 315 F.3d at 1113; *see* App. 31-53. The State, however, did not offer any authority for admitting these facts into evidence, and the district court's attempt to utilize judicial notice "exceed[ed] the limits of Rule 201" of the Federal Rules of Evidence. *Id.* at 1113-1114 (citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983)). Judicial notice was particularly inappropriate where, as here, the litigants in both proceedings were not the same, such that Wyatt did not have the opportunity to challenge the "facts" from *Toyebo*.

Because the State's summary judgment motion would be denied on the facts, whether or not Wyatt received fair notice of the procedures set forth in Fed. R. Civ. P. 56, consideration of the fair notice issue presented by the State's petition would at best result in harmless error. 28 U.S.C. § 2111; Fed. R. Civ. P. 61; *United States v. Lane*, 474 U.S. 438, 454-455 (1986) (Brennan and Blackmun, JJ., concurring in part and dissenting in part) (lower court error "affects substantial rights" under Section 2111 and is reversible "only if it casts doubt on the outcome of the proceeding").

CONCLUSION

For these reasons, the State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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